Cm

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT UAW

JOHN A. FILLION
General Counsel

M. JAY WHITMAN
Assoc. General Counsel

ALAN V. REUTHER
Asst. General Counsel
8000 East Jefferson Avenue
Detroit, Michigan 48214

Of Counsel:

KATZ, FRIEDMAN, SCHUR & EAGLE, P.C.
7 South Dearborn Street
Chicago, Illinois 60603

Counsel for UAW

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES—Continued

INDEX OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,
Petitioner,

v.

PENSION BENEFIT GUARANTY CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT UAW

COUNTERSTATEMENT OF THE QUESTION PRESENTED

A defined benefit pension plan is terminated after the September 2, 1974, effective date of the guaranty pro-

visions of ERISA,[1] 29 U.S.C. § 1322, but before the January 1, 1976, effective date of the Act's minimum vesting rules, 29 U.S.C. § 1053. The retirement benefits are vested under the terms of the plan. However, the assets of the trust are insufficient to fund them fully. PBGC[2] guarantees the benefits, finding them "nonforfeitable" within 29 U.S.C. § 1322,[3] and asserts statutory liability against the employer under 29 U.S.C. § 1362.[4]

In such a termination, does the plan's disclaimer, purporting to exclude recourse to the employer's assets for satisfaction of vested rights, render those rights *not* "nonforfeitable" within 29 U.S.C. § 1322, and thus not subject to PBGC guaranty?

COUNTERSTATEMENT OF THE CASE

In 1960, by agreement with the UAW,[5] the Nachman Corporation established a pension plan for hourly employees at its facility in Chicago. The Plan promised a defined benefit, ranging from $1.60 to $3.50 *per* month *per* year of service, depending on the date of retirement, not to exceed a monthly *maximum* ranging from $48 to $105.[6]

[1] Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1975), Pub. L. 93-406, of which the guaranty provisions are Title IV, 29 U.S.C. §§ 1301-1381, 88 Stat. 1003-1034. The relevant provsions are reproduced in the Addendum to Petitioner's Brief at 7-9, hereafter cited "Ad. 7-9."

[2] Pension Benefit Guaranty Corporation, existing within the Department of Labor. *See:* §§ 4002-4009 of ERISA, 29 U.S.C. §§ 1302-1309 (1975).

[3] § 4022 of ERISA, at Ad. 7.

[4] § 4062 of ERISA, at Ad. 7-8.

[5] Co-respondents, whose full name is in the caption, hereafter "UAW".

[6] The Plan, as amended, is reprinted in the Appendix at 13-52, hereafter cited "A. 13-52." The $1.60/mo./yr. rate, applied to retirements before November 2, 1964. The defined benefit ranged up to the $3.50/mo/yr. rate, promised those who retired after November 1, 1973. (A. 49-50)

As is typical of a defined benefit plan,[7] Nachman was required to make contributions to a trust fund on an actuarial basis.[8]

The Plan's structure reflects the normal divisions. Separate articles set out: the defined benefit promise;[9] what age and service is required for a vested right to

[7] There are two basic types of pension programs: (1) "defined benefit"; and (2) "defined contribution" or "individual account" plans. This Court noted the difference in *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 593 n. 18 (1977): "Petitioner's plan is a 'defined benefit' plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type is a 'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever levels of benefits the amount contributed on his behalf will provide." In "defined contribution" plans, the money is paid into an individual account for each employee, hence the name "individual account" plan. A defined contribution or individual account plan's liabilities cannot exceed its assets. There is, then, never any funding insufficiency for PBGC to insure. Defined contribution or individual account plans, accordingly, are excluded from Title IV's coverage. § 4021(b)(1) & (12), 29 U.S.C. § 1321(b)(1) & (12) (1975). In contrast, a defined benefit plan's actuarial liabilities ordinarily far exceed its assets, because of unfunded past service liability. *See:* note 8, *infra.*

[8] Art. IV § 2 of the Plan requires payment of normal cost, past service liability, and administrative expenses. (A. 22-3) "Normal cost" is the money which, according to the actuary, will fund the benefits due, on retirement, for work done in the current plan year. "Past service liability" arises only because when the pension plan started, employees were given credit for *all* years worked with the employer, not just years since the plan began. *E.g.*, suppose a plan starts in 1960, but allows any 65 year old employee with 10 years of service to retire in 1961. Only one year (1960) will be paid by 1961. If an individual has 30 years of service, and retires in 1961, then 29 years of "past service" remain to be funded. This "past service liability" is funded by amortizing the principal, plus interest, over a 30-year funding cycle. A yearly contribution to this amortization is required, in addition to normal cost, if the plan is to pay benefits when due.

[9] Article II, as amended (A. 14-17, 38-52).

those benefits;[10] establishment of a trust fund and bank trustee;[11] actuarial funding;[12] and various administrative matters.[13]

The labor agreement expired October 31, 1975. Nachman then decided to close the plan. On December 31, 1975, Nachman unilaterally terminated the Plan.[14]

The assets in the trust fund are insufficient to pay all the vested rights which accrued before the termination. Those assets can provide only 35% of the accrued vested benefits.[15] If not subject to the PBGC guaranty, the benefits of the 135 retirees will be reduced ratably—from an average of $77 a month to $27 a month.[16]

There is no dispute that the pension rights here are vested under the terms of the Plan.[17] PBGC determined that, as such, they are "nonforfeitable" within § 4022 of ERISA, 29 U.S.C. § 1322, and so subject to guaranty.[18]

[10] Article VII (A. 28): for normal retirement benefits, age 65 and 10 years of service; for early retirement benefits, age 60 and 10 years of service; for disability retirement benefits, a finding of disability and 15 years of service; and for deferred vested retirement benefits, termination after age 45, but before 60, with 15 years of service. Article VIII governs the mechanics of payment. (A. 29-31)

[11] Article V (A. 24-25).

[12] Article IV (A. 22-23).

[13] Article III, administration (A. 18-22); Article I, establishment (A. 13-14); Article IX, amendment (A. 31-32); Article X, termination (A. 32-35); and Article XI, miscellaneous (A. 35-37).

[14] Complaint, ¶ 10 (A. 5).

[15] Affidavit of Robert Kryvicky (A. 75).

[16] 592 F.2d at 961 n. 29, *reprinted in* the Appendix to the Petition at 24, *relying on* Affidavit of Robert Kryvicky (A. 75).

[17] 592 F.2d at 952, *reprinted in* Appendix to Petition at 5-6. *See:* Nachman's Brief at 15, 27-29.

[18] Complaint ¶ 19 (A. 8).

Nachman sued for a declaration that the benefits cannot be guaranteed under Title IV,[19] and to enjoin PBGC's assertion of 4062 liability.[20] Although it terminated the Plan well after the September 2, 1974, effective date of Title VI,[21] Nachman argued that the language of the Plan foreclosed the statutory guaranty. Article V § 3, dealing with the trust fund, provided:

> The Fund shall be utilized for the payment of benefits provided herein and for payment of the Trustee's fees, expenses of administration, and fees and expenses . . . to the extent not paid directly by the Company. Benefits provided for herein shall be only such benefits as can be provided by the assets of the fund. In the event of termination of this Plan, there shall be no liability or obligation on the part of the Company to make any further contributions to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid. [Article V § 3 (A. 24)]

Nachman claimed, that prior to the January 1, 1976, effective date of the minimum vesting rules, 29 U.S.C. § 1053,[22] clauses like Article V § 3 could operate to make benefits conditional on adequate funding, and thus, *not* "nonforfeitable". On Nachman's view, after that date, the minimum vesting rules would void such clauses. The UAW intervened.

On cross-motions for summary judgment, the District Court adopted Nachman's reading, holding that Congress did not intend, until January 1, 1976, to subject employers, through § 4062, to liability for unfunded benefits

[19] *Id.* The statutory provisions are *reprinted at* Ad. 7-8.

[20] Complaint, prayer (A. 1-9, at 9).

[21] § 4082(a) of ERISA, 29 U.S.C. § 1381(a), Ad. 8.

[22] § 203 of ERISA, at Ad. 5-6.

which they had disclaimed.[23] The District Court did not reach the constitutional issue.

The Seventh Circuit reversed.[24] Applying Title I's definition of "nonforfeitable", found in § 3(19),[25] to Title IV, the Court below held that, in light of the legislative history, vested pension rights satisfied that definition, without regard to the adequacy of funding. The claims were unconditional and enforceable *against the plan,* precisely as § 3(19) requires. The *claims* are *unconditional and enforceable* even though, for lack of funding, they may not be *collectable.* As the disclaimer deals with recourse against the employer, rather than the plan itself, it is irrelevant. Congress plainly intended to guaranty benefits on September 2, 1974. "[T]he purpose of Title IV was to guarantee benefits that might be lost because of employer liability disclaimers." 592 F.2d at 956, Appendix to Petition at 11. The Circuit Court held the vested rights subject to PBGC's guaranty, and Nachman, as a result, subject to § 4062 liability. It also held that Title IV satisfies the Due Process Clause of the Fifth Amendment.

The Court granted *certiorari,* limited to the statutory issue. —— U.S. —— (June 18, 1979), 99 S. Ct. 2881, 61 L. Ed 2d 310.

[23] 436 F. Supp. 1334 (N.D. Ill. 1977) (*per* Marovitz, J.) (A. 76-85).

[24] 592 F.2d 947 (7th Cir. 1979) (*per* Sprecher, J., *with* Cummings & Wisdom, J.J.), *reprinted in* the Appendix to the Petition at 1-29.

[25] § 3(19) of ERISA, 29 U.S.C. § 1002(19): "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan." (Ad. 4-5)

SUMMARY OF ARGUMENT

Congress intended to guarantee vested rights on September 2, 1974. The language and legislative history of Title IV demonstrate that the termination insurance program was intended to take effect *immediately* in order to meet an urgent need. Congress did not intend to allow employers 16 months in which to terminate these plans and exacerbate the problem.

There are two analytic routes to the "true" meaning of "nonforfeitable". Under either, these vested rights are guaranteed.

(i) Title IV is silent as to the meaning of the term "nonforfeitable", as Congress intended. PBGC properly filled the statutory interstice with a reasonable regulation that comports with the purposes of Title IV.

(ii) This regulation, and the resulting guaranty, are consistent, as well, with the definition of "nonforfeitable" contained in § 3(19) of Title I. As the Seventh Circuit held, the pension rights here satisfy this definition. The *claims* are unconditional and are enforceable *against the plan,* precisely as § 3(19) requires. The liability disclaimer in Article V § 3 is irrelevant.

Thus, whatever analytic route is followed, the pension rights here are "nonforfeitable", and guaranteed under § 4022.

The legislative history demonstrates that Title IV was designed to guarantee "vested" rights which would otherwise be lost due to liability disclaimers. Title IV repeatedly was said to guarantee "vested" rights. The committee reports and debates demonstrate an intent to remedy the problem of benefit loss resulting from disclaimers, when plans terminated without sufficient assets.

Congress did *not* intend to tie termination insurance coverage to the minimum vesting standards in Title I. Indeed, it recognized that these Titles were directed towards *distinct* problems.

There was no intent to delay the cost impact of Title IV. Instead, Congress moderated the potential liability of employers under § 4062.

Congress enacted § 4062 to deter solvent employers from needlessly terminating their plans, and from shifting the liability for continued funding to Title IV. Imposition of § 4062 liability on Nachman furthers this purpose, since it could have "frozen" the Plan instead of terminating it.

Nachman's argument that "nonforfeitable" must be construed to mean absolutely unconditional, without regard to funding, leads to indefensible conclusions. It renders Title IV superfluous after January 1, 1976. If disclaimers are invalidated once the minimum vested standards take effect, participants may bring suit, using § 203, anytime their rights are not fully possessory. The moderating compromises, limiting § 4062 liability, will be swept away.

Nachman's logic also conflicts with the language of Title IV, and trivializes the reporting requirements of Title I itself.

* * * *

ARGUMENT

The Court is asked to decide a question of legislative intent. Did Congress intend to guaranty vested rights in defined benefit pension plans on the September 2, 1974, effective date of Title IV, regardless of liability disclaimers? Or did it, as Nachman urges, intend to delay that protection, with minor exceptions, until the January 1, 1976, effective date of the minimum vesting rules of Title I? In human terms, the stakes are significant.[26]

Congress made no secret of the purpose of Title IV—protection of anticipated pension rights against loss because of termination before requisite funds had accumulated.[27] It made Title IV effective on September 2, 1974.[28] It said nothing about a 16 month delay. On the contrary, the benefit guarantees were made *retroactively effective*, for

---

[26] The first 16 months of PBGC's program are premised largely on the legal positions at issue here. During that period, PBGC provided (and continues to provide) pension guarantees to 20,995 individuals, amounting to some $52,785,000 in benefits. Even on conservative assumptions, 12,105 of those individuals, and some $32,986,000 of those benefits, arose in plans whose liability disclaimers matched Nachman's. *See:* Affidavit of Joseph E. Ellinger (A. 73-4). As the Seventh Circuit notes, the record does not reveal whether the other plans used various forms of *indirect* disclaimer. 592 F.2d at 956 n.14 (Appendix to Petition at 15). Such indirect disclaimers are not unusual, even after 1976, *see, e.g.*, the Westinghouse Pension Plan (1976-79), *reprinted in* B.N.A., COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS, § 48, at 618, 622 (1977).

[27] § 2(a) of ERISA, 29 U.S.C. § 1001(a), contains Congress's findings and declaration: "The Congress finds . . . that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . that they have become an important factor affecting the stability of employment and the successful development of industrial relations; . . . that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits . . . owing to the termination of plans before requisite funds have been accumulated. . . ."

[28] § 4082(a) of ERISA, 29 U.S.C. § 1381(a), at Ad. 8.

a two month "window". During this period PBGC was liable for guarantees, but was barred from asserting § 4062 liability against employers.[29] It would gainsay common sense for Congress to pass such a program, yet allow 16 months to terminate plans, free from guaranty or liability. That would only exacerbate the problem.

Nachman reaches its conclusion by fastening on the word "unconditional" in § 3(19),[30] the Title I definition of "nonforfeitable". To be guaranteed under § 4022, 29 U.S.C. § 1322, a claim must be nonforfeitable. But, to be *truly* nonforfeitable, Nachman tells us, the claim must be *truly* unconditional. Article V § 3 conditions the claim on funding, says Nachman, so these vested rights are *not* nonforfeitable, and *not* subject to guaranty. This will all change in 1976 when, it is argued, the minimum vesting rules of § 203, 29 U.S.C. § 1053, will require all claims to be *truly* unconditional.

Such a narrow and hostile reading does not comport with Congress's remedial intent. It limits Title IV, in the pre-1976 period, to a minuscule class of cases. For there to be a guaranty, the plan must allow recourse directly to the employer's (as distinct from the plan's) assets, *and* the employer must be insolvent. If no such recourse is allowed, although the employer is solvent, there can be no guaranty, says Nachman. If recourse is allowed, and the employer is solvent, there is no need for a guaranty. And, if no recourse is allowed, and the employer is insolvent, the retirees are doubly damned. Neither the language, nor the legislative history of Title IV, as we will see, supports such a hostile construction. Nachman's version of the definition of "nonforfeitable", if applied to

[29] § 4062, 29 U.S.C. § 1362, like most of Title IV, is not effective until September 2, 1974. *id.* The "window" is provided by § 4082 (b)(2) of ERISA, 29 U.S.C. § 1381(b). It ran from July 1, 1974, to September 2, 1974.

[30] *Reprinted at* note 25, *supra.*

the post-1976 world, necessarily opens some disturbing, not to say dangerous, doors.[31]

I

Meaning of "Nonforfeitable"

All agree that the meaning of "nonforfeitable" should be consistent, or at least consonant, throughout ERISA. The debate is about which of the competing versions, PBGC's or Nachman's, fulfills the legislative intent. There are two possible analytical routes to the "true" version. Title IV lacks a definition of "nonforfeitable". Either Congress intended this silence, so PBGC's regulation, 29 C.F.R. § 2605.6(a),[32] correctly fills the statutory interstice. Or the definition is misplaced, only to be found in Title I's § 3(19), so a construction of § 3(19) is required. The Seventh Circuit chose the second route.[33] By *either* analytical route, the vested rights here are "nonforfeitable".

A. *Title IV Has No Definition of "Nonforfeitable". PBGC Correctly Supplied One.*

Title IV does not contain its own definition of "nonforfeitable". The only definition of the term in ERISA is in § 3(19), 29 U.S.C. § 1002(19),[34] which is explicitly limited to Title I.[35]

[31] *See generally:* Brief of General Motors Corporation, *amicus curiae,* in support of PBGC and UAW.

[32] ". . . [A] benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant has satisfied all of the conditions required of him under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, or the completion of a required waiting period." 29 C.F.R. § 2605.6(a)

[33] 592 F.2d at 952-3, *incl.* n. 6, *reprinted in* Appendix to Petition at 7.

[34] *Reprinted at* note 25, *supra.*

[35] § 3 of ERISA, 29 U.S.C. § 1002: "For purposes of this subchapter [*i.e.*, 29 U.S.C. §§ 1001-1144] . . ."

Title IV contains its own set of definitions.[36] Some definitions are new, and unique to Title IV.[37] Others are expressly borrowed from Titles I and II.[38] Congress, then, was quite able to supply or borrow definitions for Title IV. The silence as to "nonforfeitable" was intended,[39] or, at least, must be presumed so.

---

[36] § 4001 of ERISA, 29 U.S.C. § 1301.

[37] *See:* § 4001(a)(2), defining "substantial employer"; § 4001(a)(4), defining "corporation"; § 4001(a)(5), defining "fund"; § 4001(a)(6), defining "basic benefits"; and § 4001(a)(7), defining "non-basic benefit". 29 U.S.C. § 1301(a)(2), (4), (5), (6), (7).

[38] Title IV's definition of "administrator", § 4001(a)(1), 29 U.S.C. § 1301(a)(1), is from Title I's § 3(16), 29 U.S.C. § 1002(16). Title IV's definition of "multiemployer plan", § 4001(a)(3), 29 U.S.C. § 1301(a)(3), borrows 26 U.S.C. § 414(f) from Title II's amendments to the I.R.C.

[39] In the House bill, the definition of "nonforfeitable", the provisions dealing with minimum vesting standards, and those dealing with termination insurance were all contained in (what was to become) Title I. The definition of "nonforfeitable", in that bill, applied to the termination insurance provisions, as well as the minimum vesting standards. This was appropriate, since the House bill tied the termination insurance coverage to rights vested under the bill's minimum vesting standards. H.R. 2, *as amended,* 93d Cong., 2d Sess., at 1-3, § 409(b) (1974), III LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 at 3898-3900, 4024 (G.P.O. ed. 1976), hereafter cited "LEG. HIST.". In contrast, in the Senate bill the termination insurance provisions were contained in Title IV, and the minimum vesting standards were in Title I. There was no "definitions" section in Title I. This separation of the termination insurance provisions and the minimum vesting standards reflected the fact that the Senate bill provided for termination insurance coverage of benefits vested under the plan. H.R. 2, *as amended,* 93d Cong., 2d Sess., at 354-7, § 422(a) (1974), III LEG. HIST. at 3601-3604, 3702. The Conference Committee adopted the termination insurance provisions of the Senate bill. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 1-5, 225, 251-3, 368 (1974), III LEG. HIST. at 4277-81, 4495, 4519-21, 4635. Since it was not appropriate to make these provisions depend on a definition of "nonforfeitable" designed primarily for the House bill's minimum vesting standards, the Committee adopted the structure of the Senate bill. It placed the termination insurance provisions in Title IV, and the definition and vesting provisions in Title I. The definitions of Title I were, by their terms, limited to Title I.

The fair inference is that Congress meant for the agency charged with administering such a complicated program to fill the interstice by regulation. This is exactly what PBGC did, adopting a regulation, 29 C.F.R. § 2605.6(a), under which these benefits are plainly guaranteed.

Congress's grant of authority to PBGC is very broad.[40] It went so far as to give PBGC discretion, under Title IV, to extend its guaranty to non-basic benefits, and to cover certain multiemployer plans.[41] If exercised, that discretion could involve billions of dollars.[42] Its existence, whether or not exercised, demonstrates a legislative ease as regards PBGC, especially where the scope of its coverage is concerned.

---

[40] § 4002(b)(3), 29 U.S.C. § 1302(b)(3): ". . . [T]he corporation has the power—. . . (3) to adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this Act . . ."

[41] Coverage is ordinarily limited to basic benefits. Non-basic benefits, *e.g.,* certain supplements, lump sums, health insurances, *etc.,* are not guaranteed. Yet § 4022(c), 29 U.S.C. § 1322(c), authorizes the PBGC ". . . to guarantee the payment of such other [*i.e.,* non-basic] classes of benefits and to establish the terms and conditions under which such other classes of benefits are guaranteed as it determines to be appropriate." To date, PBGC has not used this provision. 29 C.F.R. §§ 2609.1-2609.8 (1977). Multiemployer plans can be covered, at PBGC's discretion, on a case-by-case basis. § 4082(c)(2)-(4), 29 U.S.C. § 1381(c)(2)-(4).

[42] *E.g.,* a recent study indicates that 10% of multiemployer plans will face financial hardships which, in the next ten years, raise the possibility of termination. These plans cover about 1.3 million participants. They have, in the aggregate, about $8.3 billion in gross unfunded liability for guaranteeable benefits. That figure, less assets, leaves a net exposure of some $4.8 billion to PBGC, if the plans were covered. Understandably, PBGC has not seen fit to exercise this discretion, except in a couple of instances. It nonetheless exists. PBGC, MULTIEMPLOYER STUDY REQUIRED BY P.L. 95-214, at 15-16 (1978).

Deference to the PBGC here comports with "the venerable principle that the construction of the statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *E. I. du Pont de Nemours & Co.* v. *Collins,* 432 U.S. 46, 55 (1977), *quoting Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1969). This is particularly so while the statutory parts are "yet untried and new". *Power Reactor Development Co.* v. *I.U.E.*, 367 U.S. 396, 408 (1961).

B. *The Court Below Properly Parsed* § *3(19).*

Under the alternative analysis, followed by the Seventh Circuit, a parsing of Title I's § 3(19) is required. It leads to the same conclusion.

Exceptions to remedial legislation are always narrowly construed. *A. H. Phillips, Inc.* v. *Walling,* 324 U.S. 490, 493 (1945). Congress proceeded on this assumption.[43]

The Seventh Circuit's construction, set out in the margin,[44] is correct. Section 3(19), 29 U.S.C. § 1002(19), provides:

[43] In the early discussions, we find: "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exceptions should be confined to their narrow purpose." S. Rep. 93-127, 93d Cong., 1st Sess., at 18 (1973), I LEG. HIST. at 604.

[44] 592 F. 2d at 953-4: "This construction, like the district court's also derives from the three elements required for nonforfeitability under the Section 1002(19) definition: the 'claim' to the benefits must 'arise from the participant's service,' it must be 'unconditional' and it must be 'legally enforceable against the *Plan*.' (Emphasis added) The benefit claims in issue can be seen to satisfy all three elements. The claims arise from participant service. Second, although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable. Nor is their claim against the plan

[Footnote continued]

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

The definition refers to "a *claim* obtained by a participant . . . to [a] benefit . . . , which is unconditional, and which is legally enforceable against the plan." (italics supplied) The last two reflexive clauses—"which is unconditional" and "which is legally enforceable against the plan"—reflect on the word "claim", not on the word "benefit". There is a comma before each clause, separating it from "benefit", and making each clause parallel to the "obtained by . . ." clause. The "obtained by . . ." clause modifies the word "claim", as must any parallel clause.

The question, then, is whether the *claim* is unconditional and enforceable against the plan, *not* whether the benefit is so. The *claims* here clearly meet this test. In a defined benefit plan, like the instant Plan, the basic

conditional. All conditions placed upon the participant such as age and length of service have been met. The PBGC definition interprets 'unconditional' only as referring to those conditions placed on the participant and not to sufficiency of assets. Satisfaction of the claim is dependent upon sufficient assets, but this should not be viewed as a condition on the claim. Under the pre-ERISA terminology, one author clarified that although benefit claims in fact were conditioned on the availability of funds in the trust, they were not to be considered conditional rights. . . . [quotation omitted] . . . D. McGill, PRESERVATION OF PENSION BENEFIT RIGHTS, 6 (1972). *See also:* Departments of Treasury and Labor, STUDY OF PENSION PLAN TERMINATIONS . . . 19 (1973). In sum, the definition instructs that nonforfeitability must be measured by the quantum of rights against the Plan and without regard to rights against the employer. The liability exclusion clause is therefore irrelevant to a determination of nonforfeitability because it relates only to a claim the employee may have had against an entity other than the Plan itself." [Appendix to Petition at 8-9, footnote omitted]

promise is to supply a stated benefit to participants.[45] Since these employees have satisfied all of the requirements for eligibility placed on them by Article VII,[46] their pension claims are unconditional. The liability disclaimer contained in Article V § 3, and other clauses of its type, were designed in the pre-ERISA world to defeat possession of the expected benefit in the event of fund insufficiency on termination. But this clause does not *divest* the participants of any rights, or make their rights unenforceable against the Plan. It simply defeats *possession* of their vested rights, in the event of fund insufficiency.

There is a great difference between a vested right or claim to something, and the possession of it. A vested right simply determines who, among the contenders, has the best claim. It certainly does not guarantee possession, as any judgment creditor who has tried to execute on an insolvent debtor well knows. Nor does it guarantee that, when and if possession occurs, the vested right will have a particular value. Any number of things, including inadequate funds in the hands of the debtor, can defeat possession or diminish value *without* divesting the right.

There is also a difference between enforcement of pension rights, and possession of those rights. A vested participant would be entitled to a judgment declaring his right, as against any non-vested participant, to the defined benefit promised by a plan. Perhaps, because of fund insufficiency, he could not collect. But that does not alter the legal enforceability of his claim, any more than a *nulla bona* return on a writ of execution alters that of a judgment creditor. In either case, the law will enforce, but there is simply nothing to enforce against.

In applying § 3(19) to § 4022, there is an obvious need to read the definition flexibly enough to distinguish between claims and possession. Section 4022 is, after all, addressed to participants who have claims which must

---

[45] *See:* note 6, *supra.*

[46] *See:* note 10, *supra.*

be guaranteed *because* the plan's assets are inadequate to make them possessory. As we shall see, Congress used "vested" and "nonforfeitable" interchangeably. It intended to guaranty these rights *immediately* under Title IV, *despite* liability disclaimers.[47]

Contrary to Nachman's assertion,[48] this parsing of § 3(19) is supported by the legislative evolution of the definition. Although the statutory language varied, the intent did not.[49]

---

[47] Part II, *infra.* Nachman's Brief, at 17 n. 41, and the Brief for Concord Control, Inc., *amicus curiae,* at 15, rely on Treasury Regulation, § 1.411(a)-4(a), to suggest otherwise. 26 C.F.R. § 1.411(a)-4(a), provides, in relevant part: "Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, *a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets* or the Pension Benefit Guaranty Corporation." (italics supplied) The second sentence (italicized) provides, as PBGC urges here, that a plan qualifies under the Code even though, on termination, the only recourse is to plan assets and the PBGC. The preceeding sentence, if it is to be saved from contradiction, addresses a different problem—attempts to shed liability for vested benefits, by partial (or total) termination, without an allocation of existing plan assets. *E.g.,* in *Winpisinger* v. *Aurora Corp.,* 456 F. Supp. 559 (N.D. Oh. 1978) the trustees of the I.A.M.'s multiemployer plan adopted an amendment which retroactively eliminated vested rights for non-I.A.M. participants. The trustees tried to achieve financial advantage by elimination of these liabilities, which were no longer matched by contributions. Under the first quoted sentence of 26 C.F.R. §1.411(a)-4(a), such an amendment is a disqualifying partial termination, as it conditions rights on the sufficiency of assets.

[48] Nachman's Brief at 21.

[49] The bill originally introduced in the House, H.R. 2, defined "nonforfeitable pension benefit" as "a legal *claim* obtained by a participant or his beneficiary to that part of an immediate or deferred pension benefit, *which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such right, arises from the participant's service and is no longer contingent on continued service.*" (emphasis supplied) H.R. 2, 93d Cong., 1st Sess., § 3(20) (1973), I LEG. HIST. at 12. The com-

[Footnote continued]

II

Congress Intended to Guaranty Vested Rights on September 2, 1974.

A. *To Meet an Urgent Need, Congress Made Title IV Effective Immediately.*

Congress made Title IV effective immediately, and, if required, retroactively, in order to meet an urgent need.

panion bill, H.R. 462, contained a similar definition of "nonforfeitable right or vested right". H.R. 462, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 75. The bill originally introduced in the Senate, S. 4, contained parallel definitions. S. 4, 93d Cong., 1st Sess., § 3(26) & § 502(a)(20) (1973), I LEG. HIST. at 103, 148.

The version of S. 4 which was reported by the Senate Committee on Labor & Public Welfare contained these same definitions. S. 4, *as amended,* 93d Cong., 1st Sess., § 3(26) & § 502(20) (1973), I LEG. HIST. at 494-5, 543. The substitute for S. 4 and S. 1179, subsequently proposed by Sen. Nelson, which used "nonforfeitable" instead of "vested", still contained the same definition of "nonforfeitable pension benefit". Amendment No. 496 to S. 4, 93d Cong., 1st Sess., § 501(20) (1973), I LEG. HIST. at 1414-15. The bill which ultimately passed the Senate retained this definition. H.R. 2, *as amended,* 93d Cong., 2d Sess., § 502(a)(20) (1974), III LEG. HIST. at 3745.

The version of H.R. 2 originally reported by the House Committee on Education & Labor defined the term "nonforfeitable" in a similar manner. H.R. 2, *as amended,* 93d Cong., 1st Sess., § 3(19) (1973), II LEG. HIST. at 2251-2. This Committee subsequently reported a substitute bill, H.R. 12906, which contained a definition of "nonforfeitable" much like the present text of § 3(19). H.R. 12906, 93d Cong., 2d Sess., § 3(19) (1974), II LEG. HIST. at 2772. This substitute was passed by the House in the form of an amendment to H.R. 2. H.R. 2, *as amended,* 93d Cong., 2d Sess., § 3(19) (1974), III LEG. HIST. at 3909. The Conference Committee adopted the portion of the House bill containing this definition of "nonforfeitable". Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 11 (1974), III LEG. HIST. at 4286.

However, there is *no* indication either in the comments accompanying H.R. 12906, or in the Conference Committee Report, that this adjustment in the definition was intended to be a substantive change. Indeed, neither contains any reference to the change. Both make it clear that Title IV was still intended to guaranty *vested* rights. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 368 (1974), III LEG. HIST. at 4635; 120 CONG. REC. 3977, 3999 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294, 3346.

This is apparent in both the language and the legislative history of Title IV.

Section 2(a)[50] recites Congress's finding that "many employees with long years of employment are losing anticipated retirement benefits . . . owing to the termination of plans before requisite funds have accumulated." Section 4002(a), 29 U.S.C. § 1302(a), recites the purpose of Title IV to be accomplished by PBGC: "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants; [and] (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries . . ." Title IV was made effective on September 2, 1974. § 4082(a), 29 U.S.C. § 1381(a). The guaranty of benefits was retroactive to July 1, 1974. § 4082(b), 29 U.S.C. § 1381(b). During that two month "window", there was no § 4062 liability.[51] This "window", read against the purpose clauses, suggests urgency, not postponement.

During the floor debate on passage of the final Act, Sen. Javits[52] addressed the urgent need for immediate effect:

> Probably one of the most difficult problems confronted by the conferees was the selection of effective dates for the insurance program, and here both Senate and House conferees worked diligently to arrange a structure of effective dates that would bring the insurance

[50] 29 U.S.C. § 1001(a), *quoted in* note 27, *supra.*

[51] *See:* note 29, *supra.*

[52] The Seventh Circuit inaccurately attributes the quote to Sen. Williams. 592 F.2d at 958, Appendix to the Petition at 18. Sen. Javits was a co-sponsor of the Senate bill (S. 4), and a leading Senate conferee, with Sen. Williams. Sen. Williams, for his part, commented that the insurance provisions were made effective July 1, 1974, in order to provide "prompt and effective protection" for employees. 120 CONG. REC. 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4742.

> protection generally into effect as quickly as possible. This was done in recognition of the fact that depressed economic conditions in certain regions created the possibility that a number of plans were in critical straits and were terminating or were likely to do so imminently. Lack of immediate protection for beneficiaries in these cases involved workers who had earned or were drawing pensions notwithstanding the new provisions of the bill which have a delayed effective date.
>
> This insurance coverage will be available for single employer plans terminating as of July 1 of this year [1974], and discretion is provided to cover multiemployer plans that terminate prior to the mandatory coverage date of January 1, 1978. In order to accomplish these purposes, it was necessary to afford the Pension Benefit Insurance Corporation emergency authority to institute insurance protection on a "crash" basis and the Labor Department has provided invaluable assistance in recommending procedures that would expedite the handling of terminations during this period. Naturally, the institution of "crash" procedures during the startup of a new and untried program is bound to create some administrative difficulties, but the conferees expect the fullest cooperation from employers, trade unions, plan administrators and others in this connection. [120 CONG. REC. 29940 (Aug. 22, 1974) (remarks of Sen. Javits), III LEG. HIST. at 4766-7]

Earlier, the Conference Committee had rejected an attempt to delay the effective date of Title IV's guaranty.[53]

[53] Under the bill which passed the Senate, the benefit guaranty provisions of Title IV only applied to plan years beginning after December 31, 1976. In contrast, the House bill made the benefit guaranty provisions effective for plan years beginning after June 1, 1974. The Conference Committee adopted an early effective date, as did the House, but settled on July 1st. H.R. 2, *as amended*, 93d Cong., 2d Sess., § 482(c) (1974), III LEG. HIST. at 3740-1; H.R. 2, *as amended*, 93d Cong., 2d Sess., § 416(b) (1974), III LEG. HIST. at 4041; Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 245, 380-1 (1974), III LEG. HIST. at 4515, 4647-8.

There was no intent to delay. Nachman cannot cite a single expression of legislative intent, addressed to the final version of Title IV, which contradicts Sen. Javits. At most, they offer general references to the pattern of effective dates in Title I which, as we shall see, are addressed to distinct problems.

B. *Title IV Was Specifically Designed to Guaranty Vested Rights Which Would Otherwise Be Lost Due to Employer Liability Disclaimers.*

The termination insurance provisions, at every point in their development, were said to guaranty "vested" rights.[54] Congress used "vested" and "nonforfeitable" interchangeably both in bills and in debate.[55] The sub-

[54] S. Rep. No. 93-127, 93d Cong., 1st Sess., at 2, 24 (1973), I LEG. HIST. at 588, 610; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 7, 26, 81-2 (1973), I LEG. HIST. at 1075, 1094, 1149-50; 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1723; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 2, 14, 25 (1973), II LEG. HIST. at 2849, 2361, 2372; 120 CONG. REC. 3977, 3999 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294, 3346; *Administration Recommendations to the House and Senate Conferees*, at 45-6 (April 1974), III LEG. HIST. at 5092-3; *Summary of Differences between the Senate and the House Version of H.R. 2*, at 7-9 (June 5, 1974), III LEG. HIST. at 5213-15; Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 368 (1974), III LEG. HIST. at 4635.

[55] The early bills defined "nonforfeitable right" or "vested right" jointly. H.R. 462, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 75; S. 4, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 103; S. 4, *as amended*, 93d Cong., 1st Sess., § 3(26) (1973), I LEG. HIST. at 494-5. Throughout the legislative consideration of ERISA, there are references to "vested (*i.e.*, nonforfeitable) rights", or the use of equivalent forms of apposition. 120 CONG. REC. 29929 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4734; 120 CONG. REC. 29953 (Aug. 22, 1974) (remarks of Sen. Nelson), III LEG. HIST. at 4800; H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 53 (1974), II LEG. HIST. at 3173; H.R. No. 93-779, 93d Cong., 2d Sess., at 51 (1974), II LEG. HIST. at 2640; 120 CONG. REC. 3989 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3322; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 44 (1973), I LEG. HIST. at 1112; and 119 CONG. REC. 30139 (Sept. 18, 1973) (remarks of Sen. Tunney), II LEG. HIST. at 1730.

stitution of "nonforfeitable" for "vested" in Title IV indicates no change of intent.[56] It was, as the Court

[56] The two bills originally introduced in the Senate, S. 4 and S. 1179, both insured "vested" rights. S. 4, 93d Cong., 1st Sess., § 402 (a) (1973), I LEG. HIST. at 137; S. 1179, 93d Cong., 1st Sess., § 401 (a) (1973), I LEG. HIST. at 263. As reported by the Senate Committee on Labor & Public Welfare, S. 4 still insured "vested" rights. S. 4, *as amended*, 93d Cong., 1st Sess., § 402(a) (1973), I LEG. HIST. at 532. The version of S. 1179, reported by the Senate Committee on Finance, however, for the first time substituted the term "nonforfeitable" for "vested" in the termination insurance provisions. S. 1179, *as amended*, 93d Cong., 1st Sess., § 422(a) (1973), I LEG. HIST. at 908-9. The accompanying report made it clear that, despite the change in terminology, the termination insurance provisions were still intended to guaranty "vested" rights. S. Rep. No. 93-383, 93d Cong., 1st Sess., at 7, 26, 81-2 (1973), I LEG. HIST. at 1075, 1094, 1149-50. Sen. Nelson subsequently introduced an amendment to S. 4 which reconciled S. 4 and S. 1179. Although this amendment used "nonforfeitable", Amendment No. 496, 93d Cong., 1st Sess., § 422(a) (1973), I LEG HIST. at 1373, Sen. Nelson's written analysis explained that the termination insurance provisions were intended to guaranty "vested" rights. 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1723. During the debates, prior to passage of this Amendment, it was absolutely clear that this substitution did not constitute a *substantive* change, and that Title IV was still intended to guaranty "vested" rights. 119 CONG. REC. 30039-40 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1628-30; 119 CONG. REC. 30139 (Sept. 18, 1973) (remarks of Sen. Tunney), II LEG. HIST. at 1730; 119 CONG. REC. 30061 (Sept. 18, 1973) (remarks of Sen. Taft), II LEG. HIST. at 1665-6.

The bill originally introduced in the House, H.R. 462, insured against "loss of benefits derived from vested rights". H.R. 462, 93d Cong., 1st Sess., § 202(a) (1973), I LEG. HIST. at 81-2. As reported by the House Committee on Education & Labor, this bill still insured "vested" rights. H.R. 2, *as amended*, 93d Cong., 1st Sess., § 402(a) (1973), II LEG. HIST. at 2320-1. This Committee subsequently reported out a substitute bill, H.R. 12906, which, for the first time, used "nonforfeitable". H.R. 12906, 93d Cong., 2d Sess., § 409(b) (1974), II LEG. HIST. at 2887. The report on this substitute, though, still made it clear that the termination insurance provisions were intended to guaranty "vested" rights. 120 CONG. REC. 3977, 3999 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294, 3346. The debates preceding passage show that the Members still understood the bill to guaranty "vested" rights.

[Footnote continued]

below noted, simply a technical, conforming amendment.[57]

It was commonly understood that benefits vested, notwithstanding liability exclusion clauses, or anything else having to do with funding. Congress used the term in its traditional sense.[58] There is no indication of a different usage.

120 CONG. REC. 4283 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3382; 120 CONG. REC. 4315 (Feb. 26, 1974) (remarks of Rep. Burke), II LEG. HIST. at 3471; 120 CONG. REC. 4279 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373; 120 CONG. REC. 4780 (Feb. 28, 1974) (remarks of Rep. Drinan), III LEG. HIST. at 3590. The staff report, as well as the Administration report, to the Conference Committee, described the termination insurance provisions of both House and Senate bills as guaranteeing "vested" rights. *Summary of Difference between the Senate and the House Version of H.R. 2*, at 7-9 (June 5, 1974), III LEG. HIST. at 5213-15; *Administration Recommendations to the House and Senate Conferees*, at 45-6 (April 1974), III LEG. HIST. at 5092-3. The Conference Committee itself described the bill which it reported as guaranteeing "vested" rights. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 368 (1974), III LEG. HIST. at 4635.

During the final floor debates, it was universally recognized that the new Act would insure "vested" rights. 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694; 120 CONG. REC. 29209 (Aug. 20, 1974) (remarks of Rep. Tiernan), III LEG. HIST. at 4702; 120 CONG. REC. 29929, 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4734, 4741; 120 CONG. REC. 29935 (Aug. 22, 1974) (remarks of Sen. Javits), III LEG. HIST. at 4752.

[57] 592 F.2d at 955 note 10, Appendix to Petition at 12-13 note 10. Representatives of the Secretary of Labor testified that "there is a problem of defining the accrued benefit which will be insured. . . . [W]e probably need to get some consistency between accrued benefits definition for purposes of Internal Revenue as well as for purposes of termination insurance." *Hearings before the Subcommittee on Private Pension Plans of the Senate Committee on Finance*, 93d Cong., 1st Sess., Part I, at 437 (1973). Sen. Bentsen responded favorably to the notion of consistent definitions, but emphasized that the intent was still to insure "vested" benefits. *Id.*, at 443. Sen. Bentsen's bill, S. 1179, as reported by the Committee on Finance, was the first to substitute "nonforfeitable".

[58] D. McGill, PRESERVATION OF PENSION BENEFIT RIGHTS, 6 (1972). *See:* notes 67 & 68, *infra*, and accompanying text.

Title IV was designed to solve the problem of benefit loss resulting from termination prior to the accumulation of sufficient funds.[59] This happened because of insolvency, or liability disclaimer, or both. Most plans have disclaimers, as Congress well knew.[60] The disclaimers were, as Congress knew equally well, most frequently the source of the problem.[61] The *cause célebrè*, leading to the en-

[59] Committee reports all describe the purpose of termination insurance as being to guaranty that employees receive their "vested" pension benefits in situations where plans are terminated without sufficient funds to pay for all vested liabilities. S. Rep. No. 93-127, 93d Cong., 1st Sess., at 10 (1973), I LEG. HIST. at 596; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 3, 17, 25-6, 78 (1973), I LEG. HIST. at 1071, 1085, 1093-4, 1146; 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1723; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 1-2 (1973), II LEG. HIST. at 2348-9; 120 CONG. REC. 3977 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294.

This point was repeated in the debates. 119 CONG. REC. 7423 (March 13, 1973) (remarks of Sen. Bentsen), I LEG. HIST. 226; 119 CONG. REC. 30039-40 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1628-9; 119 CONG. REC. 30042 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1635-6; 120 CONG. REC. 4279 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373; 120 CONG. REC. 4282 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3382; 120 CONG. REC. 4318-19 (Feb. 26, 1974) (remarks of Rep. Annunzio), II LEG. HIST. at 3479; and 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694.

[60] Prior to ERISA the standard pension plan disclaimed employer liability for underfunding. *Hearings on H.R. 1269 before the Subcommittee on Labor of the House Committee on Education & Labor*, 92d Cong., 1st Sess., at 164 (1972); Greenough & King, PENSION PLANS AND PUBLIC POLICY, at 194 (1976); D. McGill, FULFILLING PENSION EXPECTATIONS, at 112, 240 (1962). Congress was aware of this fact in enacting Title IV. 120 CONG. REC. 4318 (Feb. 26, 1974) (remarks of Rep. Annunzio), II LEG. HIST. at 3479; 120 CONG. REC. 4285 (Feb. 26, 1974) (remarks of Rep. Erlenborn), II LEG. HIST. at 3388-9; and S. Rep. No. 92-634, 92d Cong., 2d Sess., at 74 (1972).

[61] The study of pension plan terminations prepared by the Departments of Treasury and Labor, on which Congress relied heavily, revealed that only 3% of the employees who lost benefits in 1972

[Footnote continued]

actment of Title IV, was the termination of Studebaker's plan in South Bend, Indiana. The benefit loss there resulted from the usual disclaimer.[62] Title IV was the remedy for the "Studebaker problem".[63]

The legislative history refutes Nachman's assertion that the guaranty of § 4022 was tied to the minimum

worked for employers having a net worth less than the employee benefit loss. Also, 71% of the employees worked for employers with a net worth of at least 1000 times greater than the benefits lost. Depts. of Treasury & Labor, STUDY OF PENSION PLAN TERMINATIONS at 61 (1973). Congress repeatedly cited this study as showing the need for termination insurance. S. Rep. No. 93-383, 93d Cong., 1st Sess., at 79 (1973), I LEG. HIST. at 1147; H.R. Rep. No. 93-779, 93d Cong., 2d Sess., at 13 (1974), II LEG. HIST. at 2602; 119 CONG. REC. 30042 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1635; 120 CONG. REC. 4279 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373; 120 CONG. REC. 4780 (Feb. 28, 1974) (remarks of Rep. Drinan), III LEG. HIST. at 3590; and 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694. As early as 1971, the Senate Subcommittee on Labor had concluded: "The need for or desirability of insurance arises because of the numerous contingencies which can result in . . . termination . . . . Employers ordinarily have no financial responsibility for pension payments beyond the contributions they are committed to make." *Interim Report of Activities of the Private Welfare & Pension Plan Study, Senate Committee on Labor & Public Welfare, Subcommittee on Labor*, 92d Cong., 2d Sess., at 74 (1971).

[62] *Hearings on Private Pension Plans before the Subcommittee on Fiscal Policy of the Joint Economic Committee*, 89th Cong., 2d Sess., at 126-7 (April 27, 1966) (testimony of W. Solenburger).

[63] S. Rep. No. 93-127, 93d Cong., 1st Sess., at 10 (1973), I LEG. HIST. at 596; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 17, 25-6, 78 (1973), I LEG. HIST. at 1085, 1093-4, 1146; H.R. Rep. No. 93-779, 93d Cong., 2d Sess., at 13 (1974), II LEG. HIST. at 2602; 119 CONG. REC. 30037 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1622; 119 CONG. REC. 30042-3 (Sept. 18, 1973) (remarks of Sens. Bentsen & Javits), II LEG. HIST. at 1635, 1639; 119 CONG. REC. 30061 (Sept. 18, 1973) (remarks of Sen. Taft), II LEG. HIST. at 1665-6; 120 CONG. REC. 4279-80 (Feb. 26, 1974) (remarks of Rep. Brademas), II LEG. HIST. at 3373-4; 120 CONG. REC. 29206 (Aug. 20, 1974) (remarks of Rep. Brademas), III LEG. HIST. at 4694.

vesting standards of § 203. Both House and Senate bills guaranteed "vested" benefits.[64] Whereas the House bill covered rights vested under the bill's minimum vesting standards, the Senate bill guaranted rights vested under the plan.[65] The Conference Committee chose the Senate version.[66] There was no intent to link the guaranty to the vesting rules, much less their effective date.

Section 203 was enacted to remedy the abuse of overly restrictive vesting requirements.[67] There was no mention

---

[64] *See:* note 54, *supra.*

[65] H.R. 2, *as amended,* 93d Cong., 2d Sess., § 409(b) (1974), III LEG. HIST. at 4024; H.R. 2, *as amended,* 93d Cong., 2d Sess., § 422 (a) (1974), III LEG. HIST. at 3702; *Summary of Differences between the Senate Version and the House Version of H.R. 2,* at 7-8 (June 5, 1974), III LEG. HIST. at 5213-14; *Administration Recommendations to the House and Senate Conferees,* at 45 (April 1974), III LEG. HIST. at 5092.

[66] Conf. Rep. No. 93-1280, 93d Cong., 2d Sess., at 225, 368 (1974), III LEG. HIST. at 4495, 4635; *Summary of Differences between the Senate Version and the House Version of H.R. 2,* at 9 (June 5, 1974), III LEG. HIST. at 5215; *Administration Recommendations to the House and Senate Conferees on H.R. 2,* at 46 (April 1974), III LEG. HIST. at 5093; and 120 CONG. REC. 29937 (Aug. 22, 1974) (remarks of Sen. Javits), III LEG. HIST. at 4757-8.

[67] Committee Reports characterize the minimum vesting standards as insuring that employees with long years of service would not lose their pension benefits because of a pre-retirement separation from employment. Many plans contained lengthy vesting requirements, or only vested an employee's pension rights on retirement. In addition to the resulting hardship, the failure to vest was inequitable, since pension contributions were typically in lieu of other compensation. Older workers lost pension rights by being discharged shortly before retirement. Abusive vesting rules were also a major obstacle to mobility. S. Rep. No. 93-127, 93d Cong., 1st Sess., at 8-9 (1973), I LEG. HIST. at 594-5; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 3, 14, 45-6 (1973), I LEG. HIST. at 1071, 1082, 1113-14; 119 CONG. REC. 30134 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1718; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 6 (1973), II LEG. HIST. at 2353; H.R. Rep. No. 93-779, 93d Cong., 2d Sess., at 3, 11-12, 52 (1974), II LEG. HIST. at 2592, 2600-01, 2641; H.R. Rep. No. 93-807, 93d Cong., 2d Sess., at 3, 11-12, 18-19, 53 (1974), II LEG. HIST. at 3123, 3131-2, 3138-9, 3173;

[Footnote continued]

of liability disclaimers or asset insufficiency. On the contrary, Title I was said to be unable to correct those problems. Title IV served *that* purpose.[68]

It is true that Congress intended to delay the cost impact of Title I's minimum vesting rules. But, even under PBGC's reading, Nachman still benefits from that delay. PBGC guarantees rights *already* vested under the plan. Here, both normal and early retirement rights were

---

120 CONG. REC. 3978, 3985, 3989 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3296, 3313, 3323.

The debates show the same purposes. 119 CONG. REC. 30004 (Sept. 18, 1973) (remarks of Sen. Williams), II LEG. HIST. at 1602, 119 CONG. REC. 30038 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1624; 119 CONG. REC. 30010-11 (Sept. 18, 1973) (remarks of Sen. Beall), II LEG. HIST. at 1619-20; 119 CONG. REC. 30041-2 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1634; 120 CONG. REC. 4281-2 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3379; 120 CONG. REC. 4775 (Feb. 28, 1974) (remarks of Rep. Grasso), III LEG. HIST. at 3578; 120 CONG. REC. 29214 (Aug. 20, 1974) (remarks of Rep. Daniels), III LEG. HIST. at 4716; 120 CONG. REC. 29929 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4734-5; and 120 CONG. REC. 29949 (Aug. 22, 1974) (remarks of Sen. Bentsen), III LEG. HIST. at 4791-2.

[68] S. Rep. No. 93-383, 93d Cong., 1st Sess., at 25-6 (1973), I LEG. HIST. at 1093-4; 119 CONG. REC. 30042 (Sept. 18, 1973) (remarks of Sen. Bentsen), II LEG. HIST. at 1635-6; 119 CONG. REC. 30004-5 (Sept. 18, 1973) (remarks of Sen. Williams), II LEG. HIST. at 1602-3; 120 CONG. REC. 4282-3 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3382; 120 CONG. REC. 4288 (Feb. 26, 1974) (remarks of Rep. Biaggi), II LEG. HIST. at 3396; 120 CONG. REC. 29950 (Aug. 22, 1974) (remarks of Sen. Bentsen), III LEG. HIST. at 4792-3; 120 CONG. REC. 29953 (Aug. 22, 1974) (remarks of Sen. Nelson), III LEG. HIST. at 4802. *See also:* S. Rep. No. 93-127, 93d Cong., 1st Sess., at 8-10 (1973), I LEG. HIST. at 594-6; S. Rep. No. 93-383, 93d Cong., 1st Sess., at 3, 14-17, 25-6, 45, 78 (1973), I LEG. HIST. at 1071, 1082-5, 1093-4, 1113, 1146; 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1718, 1723; H.R. Rep. No. 93-533, 93d Cong., 1st Sess., at 1-2 (1973), II LEG. HIST. at 2348-9; 120 CONG. REC. 3977 (Feb. 25, 1974) (material explaining H.R. 12906), II LEG. HIST. at 3294.

vested after 10 years of service.[69] These provisions already met the minimum vesting standards.[70] However, as the Plan stood at termination, disability and deferred pensions required at least 15 years of service.[71] As to these rights, the Plan fell short of all of three vesting options in § 203(a) (1) (A)-(C).[72] To comply, it would have had to vest these rights at, *e.g.*, 10 years of service. PBGC here only seeks to guaranty the disability and deferred pensions on the 15 year assumption.[73] PBGC does *not* assume, in calculating the guaranty *or the § 4062 liability*, that the plan has been amended to meet the minimum vesting rules. The effect here is to reduce the guaranty, and Nachman's § 4062 liability, by the differential cost of the more restrictive, pre-1976 vesting provisions in the Plan.[74]

Unlike Title I, there was no intent to delay the cost impact of Title IV.[75] Rather than delay, Congress moderated potential § 4062 liability. PGBC only guarantees basic benefits, and even that guaranty is subject to a five year phase-in.[76] Non-vested rights are not guaran-

[69] Art. VII § 1(a) & (b), at A. 28.

[70] § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A), at Ad. 5.

[71] Art. VII § 1(c) & (d), at A. 28.

[72] 29 U.S.C. § 1053(a)(1)(A)-(C), at Ad. 5-6.

[73] Prior to 1976, plans requiring 20 year vesting, *e.g., Daniel* v. *Teamsters*, 439 U.S. 551, —— (1979), 99 S. Ct. 790, 794, 58 L. Ed. 2d 808, 813, or even vesting only on retirement, were guaranteed on *those* assumptions.

[74] *Contrast: Allied Structural Steel Co.* v. *Spannus*, 438 U.S. 234 (1978), where the Minnesota act, in effect, required immediate 10 year vesting, and then imposed a termination liability on *that* vesting assumption, rather than the plan's.

[75] *See*: Part II(A) *supra*.

[76] *See*: note 41 *supra*; and § 4022, 29 U.S.C. § 1322.

teed. Section 4062 liability is not generated by such non-basic or non-vested rights, even on PBGC's reading. Liability is further limited to 30% of the employer's net worth.[77] PBGC has authority to "arrange reasonable terms" for payment of § 4062 liability.[78]

As the Seventh Circuit found, § 4062 is *much more* than a subrogation scheme.[79] It is an independent statutory liability. It has nothing to do with subrogation, except that it takes its measure, in part, from rights vested under the Plan and the relative solvency of the fund. Statutory liabilities commonly take their measure from private arrangements.[80]

Congress enacted § 4062 to prevent employers from shifting the burden of vested liabilities to Title IV. Two abuses were perceived: employers making irresponsible benefit promises;[81] and, more important, needless termination of plans by solvent employers.[82] During the final floor debates, Sen. Williams spoke to the importance of avoiding such terminations:

> Since there would be a possibility of abuse by solvent employers who terminate a plan and shift the financial burden to the insurance program, notwithstand-

[77] § 4062(b)(2), 29 U.S.C. § 1362(b)(2), at Ad. 7-8.

[78] § 4067, 29 U.S.C. § 1367.

[79] 592 F. 2d at 957, Appendix to the Petition at 17.

[80] *See, e.g.*: Title 26, U.S.C. (1979).

[81] S. Rep. No. 93-383, 93d Cong., 1st Sess., at 87 (1973), I LEG. HIST. at 1155; 119 CONG. REC. 30136 (Sept. 18, 1973) (analysis of Amendment No. 496), II LEG. HIST. at 1723.

[82] 120 CONG. REC. 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4741; 120 CONG. REC. 4283 (Feb. 26, 1974) (remarks of Rep. Gaydos), II LEG. HIST. at 3382; 120 CONG. REC. 4285 (Feb. 26, 1974) (remarks of Rep. Erlenborn), II LEG. HIST. at 3388; 119 CONG. REC. 30039 (Sept. 18, 1973) (remarks of Sen. Nelson), II LEG. HIST. at 1628.

> ing their financial ability to continue funding the plan, the Conference bill imposes liability on employers whose plans terminate to reimburse the program for benefits paid by the corporation [PBGC]. [120 CONG. REC. 29931 (Aug. 22, 1974) (remarks of Sen. Williams), III LEG. HIST. at 4741]

This abuse is present here. Nachman did not have to terminate, it could have "frozen" the Plan.[83] This alternative has practical advantages. There is no danger of PBGC asserting § 4062 liability, because there is no termination. There is no frustration of participants' expectations. Nachman, instead, chose to terminate. In doing so, it transgressed the Congressional purpose in Title IV.[84] It cannot now complain that PBGC demands the statutory price for that transgression.

III

Nachman's Reading of "Nonforfeitable" Proves Too Much.

The linchpin of Nachman's argument is that "nonforfeitable", both before and after 1976, means absolutely no conditions on possession of pension rights, related to funding or otherwise.[85] Nachman urges this meaning of

---

[83] That is, the Plan could have been amended so that credited service ceased to accrue prospectively. This eliminates "normal cost". Existing past service liabilities are paid over the remainder of the funding cycle, without acceleration. The plan continues. It does not terminate, so PBGC has no occasion to get involved. Benefits continue to be paid, at the anticipated level, when due. PBGC, GUIDELINES ON VOLUNTARY TERMINATION, at 4-5 (1977). *See, generally*: note 8, *supra*.

[84] § 4002(a, 29 U.S.C. § 1302(a). *See:* Part II(A), *supra*.

[85] Nachman's Brief at 22-31. It admits the statutory exceptions in § 203(a)(3)(A)-(D), 29 U.S.C. § 1053(a)(3)(A)-(D), *e.g.*, resumption of employment in the industry, *Riley* v. *MEBA Pension Trust*, 570 F.2d 406 (2d Cir. 1977), *on remand* 452 F. Supp. 117 (S.D. N.Y. 1978), *aff'd* 586 F.2d 968 (2d Cir. 1978).

"nonforfeitable" as the only way to achieve a sensible, consistent use throughout ERISA. But their reading of the term opens dangerous doors, leading to a disturbing post-1976 world. The argument proves too much.

Under Nachman's version of "nonforfeitable", Title IV becomes superfluous in 1976. On Nachman's proofs, as of 1976, no conditions are allowed to interfere with possession of vested pension rights. So, if faced with an interruption of benefits, a participant may simply bring suit to enforce the defined benefit promise against his employer.[86] The disclaimer clause, if raised as a defense, would be stricken as contrary to § 203. This scenario does not require PBGC or Title IV, except in the event of employer insolvency.[87] Such litigation would enforce defined benefit promises, at face value, down to the last jot and title. All the moderating compromises of Title IV are swept away. The 30% limit on § 4062 liability would become meaningless for solvent employers. The five year phase-in, as well as the limitation of the guaranty to basic benefits, would be irrelevant in such litigation. The employer's exposure would expand correspondingly. Nachman asks the Court to embrace something considerably more unsettling than anything the PBGC and the UAW are urging.

Nor does Nachman's argument square with the language of Title IV's provisions. Title IV constantly presumes a difference between pension rights and their satisfaction.[88] Under Nachman's logic, the provisions are

---

[86] *Cf.: Hoefel* v. *Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied sub nom. Atlas Tack Corp.* v. *Mahoney*, 440 U.S. 913 (1979).

[87] As previously noted, insolvency is the exception. *See*: note 61, *supra*.

[88] In the initial post-Act period, the receiver must determine whether the assets of the plan are sufficient to discharge all obligations with respect to benefits guaranteed under Title IV, § 4004(d), 29 U.S.C. § 1304(d). On plan termination, the administrator must

[Footnote continued]

trivialized. Pre-1976, they can only apply to the very narrow range of instances where the employer is insolvent, and the plan allows recourse. Post-1976, they become superfluous as to solvent employers and their plans.

Even Title I's reporting requirements are trivialized by applying Nachman's reading of § 3(19). Pre-1976, under Nachman's position, there are no "nonforfeitable" rights to report in the summary plan description, annual report, or statement of total benefits accrued.[89]

Finally, Nachman's construction of § 3(19) is at odds with the companion definition of "vested liabilities" in Title I's § 3(25).[90] For Nachman, pre-1976, it is impossible to have vested liabilities under § 3(25) because the typical plan contains the disclaimer. Yet, Nachman admits that the rights are vested in the present case.

---

make a similar determination, § 4041(b) & (c), 29 U.S.C. § 1341(b) & (c). PBGC can sue to terminate a plan which is unable to pay benefits when due, § 4042(a)(2), 29 U.S.C. § 1342(a)(2). Failure to pay benefits when due is a reportable event, § 4043(b)(6), 29 U.S.C. § 1343(b)(6). The amount of benefits guaranteed and the fair market value of the assets must be determined and reported, § 4046(2) & (4), 29 U.S.C. § 1346(2) & (4). Section 4062 itself measures liability by the difference between the value of benefits guaranteed, and the value of the plan's assets, § 4062(b), 29 U.S.C. § 1362(b). These provisions were all effective September 2, 1974, *not* January 1, 1976, § 4082(a), 29 U.S.C. § 1381(a).

[89] The summary plan description (SPD) must list provisions providing for nonforfeitable benefits. § 102(b), 29 U.S.C. § 1022(b). The annual report must attach an actuarial statement listing the present value of nonforfeitable benefits. § 103(d)(6), 29 U.S.C. § 1023(d)(6). The statement of benefits accrued must show the nonforfeitable benefits which have accrued, or the "earliest date" on which the benefits will become nonforfeitable. "Earliest date" implies service or age. § 105(a)(2), 29 U.S.C. § 1025(a)(2).

[90] § 3(25), 29 U.S.C. § 1002(25): "The term 'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable."

CONCLUSION

For the foregoing reasons, the Court should *affirm* the decision below.

Respectfully submitted,

JOHN A. FILLION
General Counsel

M. JAY WHITMAN
Assoc. General Counsel

ALAN V. REUTHER
Asst. General Counsel
8000 East Jefferson Avenue
Detroit, Michigan 48214

Of Counsel:

KATZ, FRIEDMAN, SCHUR & EAGLE, P.C.
7 South Dearborn Street
Chicago, Illinois 60603

Counsel for UAW

November 9, 1979.